No. 92-551

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In the Supreme Court of the United States

OCTOBER TERM, 1992

HENRY G. CISNEROS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

ALPINE RIDGE GROUP, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JOHN W. HEROLD
Associate General Counsel
Department of Housing
and Urban Development
Washington, D.C. 20410

TABLE OF AUTHORITIES

Cases: Page

Beck Park Apartments v. *HUD*, 695 F.2d 366 (9th Cir. 1982) 9
Bowen v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) 19
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 6
Campbell v. *Holt*, 115 U.S. 620 (1885) 18
Carmichaels Arbors Assocs. v. *United States*, 789 F. Supp. 683 (W.D. Pa. 1992), appeal pending, No. 92-3326 (3d Cir.) 11
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 5
Consolidated Gas Supply Corp. v. *FERC*, 745 F.2d 281 (4th Cir. 1984), cert. denied, 472 U.S. 1008 (1985) 2
Department of Labor v. *Triplett*, 494 U.S. 715 (1990) 7
Devine v. *Ladd Petroleum Corp.*, 743 F.2d 745 (10th Cir. 1984) 2
Edmonds v. *United States*, 642 F.2d 877 (1st Cir. 1981) 2
El Paso v. *Simmons*, 379 U.S. 497 (1965) 12
Energy Reserves Group, Inc. v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983) 12, 17
FCC v. *Florida Power Corp.*, 480 U.S. 245 (1987) 19
Gelfert v. *National City Bank*, 313 U.S. 221 (1941) 14
Lynch v. *United States*, 292 U.S. 571 (1934) 16
National Leased Housing Ass'n v. *United States*, 22 Cl. Ct. 649 (1991), appeal pending, No. 92-5064 (Fed. Cir.) 11
Perry v. *United States*, 294 U.S. 330 (1935) 16
Rainier View Assocs. v. *HUD*, 848 F.2d 988 (9th Cir. 1988), cert. denied, 490 U.S. 1066 (1989) 5, 9, 13
Sheridan Square Partnership v. *United States*, 761 F. Supp. 738 (D. Colo. 1991) 16
Udall v. *Tallman*, 380 U.S. 1 (1965) 6
United States v. *City of Fulton*, 475 U.S. 657 (1986) 2, 5

Cases—Continued: Page

United States v. *Morton Salt Co.*, 338 U.S. 632 (1950) 9
United States v. *Seckinger*, 397 U.S. 203 (1970) 6
United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977) 16, 18
Yee v. *City of Escondido*, 112 S. Ct. 1522 (1992) 12

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 10, Cl. 1 (Contract Clause) 18
Amend. V (Due Process Clause) 1, 16, 17
Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 1987:
§ 801, 103 Stat. 2057 ..... *passim*
§ 801(a), 103 Stat. 2057-2058 ..... 13, 14
§ 801(c), 103 Stat. 2058 15
United States Housing Act of 1937, 42 U.S.C. 1437 *et seq.*:
§ 8, 42 U.S.C. 1437f 1, 2, 7, 10, 11, 17, 18, 19
§ 8(c)(2), 42 U.S.C. 1437f(c)(2) (1982) 2, 7
§ 8(c)(2)(C), 42 U.S.C. 1437f(c)(2)(C) 5, 14
24 C.F.R.:
Section 880.204(b)(1)(ii) 8
Section 880.609(c) 6, 8
Section 888.204 ..... 9, 15

Miscellaneous:

2 American Institute of Real Estate Appraisers, *Condemnation Appraisal Practice* (1973) 10-11
Appraisal Institute, *The Appraisal of Real Estate* (10th ed. 1992) 11
135 Cong. Rec. (daily ed. Nov. 21, 1989):
p. S16,594 17
p. S16,600 17
p. S16,602 17
p. S16,608 17
41 Fed. Reg. 49,440 (1976) 8
57 Fed. Reg. 49,126 (1992) 16
H.R. Rep. No. 1114, 93d Cong., 2d Sess. (1974) 7, 8

Miscellaneous—Continued: Page

1970 HUD Handbook (May 1978) 9, 10
HUD Task Force, *Section 8 Task Force Paper No. 2: Revisions to the Section 8 Rent Adjustment Policy* (1978) 8, 9
Section 8 Rent Adjustments, Elderly Housing, and Other Assisted Housing Issues: Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs, 98th Cong., 2d Sess. (1984) 9, 10

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Respondents' constitutional attack on Section 801 of the HUD Reform Act rests on three claims: that respondents have contractual immunity from the use of comparability studies applied as separate caps to rental adjustments in the Section 8 program; that Section 801 substantially impairs that right; and that Congress's action violates the Due Process Clause because the legislature acted solely to save money. The first claim cannot be reconciled with the language of the contracts, construed in light of the regulatory program that authorized them. The second claim cannot be reconciled with the actual effect of Section 801 on the contracts, even as respondents construe them. And the third claim misunderstands the reasons prompting Congress's action and the governing legal standards. This Court should reject respondents' claim that they have a perpetual right to automatic rent ad-

justments in excess of those at comparable unassisted properties and should affirm the constitutionality of Section 801.

A. *The Assistance Contracts.* Respondents argue that, pursuant to their Assistance Contracts, HUD may not apply separate comparability caps to factor-based adjustments. Alpine Br. 26-37; Acacia Br. 20-31. That contention conflicts with the contract's terms, *Consolidated Gas Supply Corp.* v. *FERC*, 745 F.2d 281, 283 (4th Cir. 1984) ("[a]n unambiguous document controls"), cert. denied, 472 U.S. 1008 (1985); *Devine* v. *Ladd Petroleum Corp.*, 743 F.2d 745, 748 (10th Cir. 1984); *Edmonds* v. *United States*, 642 F.2d 877, 881 (1st Cir. 1981); the principle that a contract that parallels a statute must be interpreted in light of the agency's interpretation of the statute, *United States* v. *City of Fulton*, 475 U.S. 657, 672 (1986); and the purposes and background of the Section 8 program.

1. The basic obstacle to respondents' approach is the language of the contracts. To implement its statutory mandate, see 42 U.S.C. 1437f(c)(2) (1982), HUD drafted the Assistance Contracts to provide that (A) rents were to be adjusted annually through factors determined by HUD; (B) special additional adjustments were to be granted when required to reflect general increases in actual and necessary operating expenses not covered by the factor-based adjustment; and (C) as an "overall limitation,"

> Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government * * *.[1]

[1] Assistance Contract, § 1.9. The "overall limitation" provision goes on to state that "this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed

Alpine argues that the "overall limitation" is simply a guide to how the factor-based adjustment must be computed by HUD. Alpine Br. 15. The overall limitation, however, is not written as a direction to HUD about what factors to select for purposes of adjustments under § 1.9b of the contract; rather, the limitation is a separate economic constraint on rental adjustments and supersedes any conflicting application of other provisions. The structure of the contract makes that clear. It provides for two methods of adjustment (annual and special), each governed by separate criteria,[2] and subjects both to an overarching financial limitation of comparability. HUD *must* implement that limitation through an inquiry into "the rents charged for assisted and comparable unassisted units," and having made such a determination, HUD must then avoid any adjustment that would produce "material differences."[3] § 1.9d. Alpine's reading converts the

with respect to the initial Contract Rents." § 1.9d. Alpine asserts (Br. 13) that the contract "guaranteed that that relationship [of initial rent to market rent] would be preserved." The contract, however, does not refer to a "relationship," but to an "initial difference"—the dollar difference between comparable property rents and the rents authorized in the initial contract. HUD's system for applying comparability studies protected the initial difference. See Gov't Br. 18 n.15 (describing a "material difference"); Gov't Reply Br. in Support of Pet. for Cert. 5 & n.5.

[2] The components of the factor-based adjustments are to "be determined by the Government" and "the basis for their determination published in the Federal Register." § 1.9b(1). The "special additional adjustments" are to be "demonstrate[d]" by the owner and must respond to "substantial general increases in real property taxes, utility rates, or similar costs." § 1.9c.

[3] The "overall limitation" clause clearly applies as a separate and independent cap on special operating expense adjustments computed under § 1.9c, and there is no reason to construe the same clause differently with respect to factor-based adjustments computed under § 1.9b.

"overall limitation" into a subordinate guideline for composing the factors.[4]

Acacia asserts that the "overall limitation" does not provide HUD with authority to restrict factor-based adjustments through comparability studies, because the "overall limitation" governs adjustments "as provided in this Section" (*i.e.*, factor-based adjustments) and does not provide an independent process for adjusting rents. Acacia Br. 17. HUD, however, did not use comparability studies as an independent process for initiating adjustments, but used the studies to make an inquiry into "the rents charged for assisted and comparable unassisted units" for purposes of applying the overall limitation. HUD's approach allowed the "overall limitation" to play the role that the contract assigned to it: it acted as the final step of the process of applying adjustments to ensure that they would not result in a "material difference."

2. Our opening brief demonstrates that the Secretary's construction of the Housing Act to permit comparability caps is entitled to deference. Gov't Br. 20-22. Respondents argue that no deference should be given to the Secretary's interpretation of the Housing Act and the implementing Assistance Contracts because deference is irrelevant in a contract case. Alpine Br. 28 n.81; Acacia Br. 24-25. Yet, as Alpine recognizes, "HUD's statutory mandate to keep Section 8 rents in line with market rents * * * was incorporated into plaintiffs' contracts * * *." Alpine Br. 24. Acacia similarly acknowledges (Br. 4)

[4] Alpine suggests (Br. 30) that the contract's characterization of the annual adjustment as "automatic" would be nullified under HUD's view of the "overall limitation" provision. The use of the word "automatic," however, meant only that the owner did not have to request the adjustment; when the program shifted to requiring an owner to request an adjustment, the Assistance Contract was revised to delete use of the word "automatic." See Post-1980 Assistance Contract, § 2.7(b)(1) ("Upon request from the Owner to the CA, Contract Rents will be adjusted on the anniversary date of the Contract * * *"), *reproduced at* Gov't Br. App. 9a.

that the "overall limitation provision * * * echoes th[e] statutory command" of 42 U.S.C. 1437f(c)(2)(C)." The Secretary's interpretation of the statute is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and because the Assistance Contracts incorporate the statutory requirements, the Secretary's interpretation of the statute is directly relevant in construing the contracts.

The relevance of the Secretary's interpretation is illustrated by *United States* v. *City of Fulton*, *supra*. There, the Court considered whether, under applicable statutes and contracts between the government and other parties, an agency could permit interim rates for hydroelectric power to go into effect pending further federal review of those rates. The Court first concluded that the agency's view that the statute permitted interim rates to be effective was entitled to deference under *Chevron*, *supra*, 475 U.S. at 666-668. The Court then turned to the issue of whether the contract the government had entered into permitted interim rates. The Court held that the contract language, which "track[ed] that of the statute," should be read in the same way, explaining that "[i]f the Government had meant by that contractual language to bind itself with restrictions going beyond those contained in the statute, we believe that such restrictions would have been set out more explicitly." *Id.* at 672.

The same analysis applies in this case. The Housing Act charges HUD with the responsibility to avoid rent adjustments that would result in material differences be-

[5] The Ninth Circuit similarly recognized that the issue of whether comparability studies are permissible is "contract related," but "rests at bottom on statutory or regulatory rights." Pet. for Cert. App. at 50a, *United States* v. *Rainier View Assocs.*, No. 88-1515 (Oct. Term 1988). See also *Rainier View Assocs.* v. *HUD*, 848 F.2d 988, 991 (9th Cir. 1988) (interpreting contractual "overall limitation" provision "consistent with its statutory analog, Section 8(c)(2)(C)"), cert. denied, 490 U.S. 1066 (1989).

tween assisted and comparable unassisted projects, and a longstanding HUD regulation reflects the agency's interpretation that the comparability rule is an "overall limitation." 24 C.F.R. 880.609(c); see Gov't Br. 27-28. HUD's interpretation of that regulation to authorize project-specific comparability caps is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation," *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); see *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965), and the interpretation was ultimately ratified by Congress. Gov't Br. 22. HUD did not contract away its authority to use comparability caps when it inserted the "overall limitation" provision in the Assistance Contracts; to the contrary, that provision clearly expresses the comparability requirement. Accordingly, the Assistance Contracts should be given a parallel reading to HUD's reading of the underlying statute and regulations: factor-based increases may be "capped" by comparability studies when those increases would exceed rent levels in the unassisted market.[6]

3. Respondents rely on a variety of background materials in support of their claim that HUD construed the "overall limitation" clause as something other than a separate cap. Alpine Br. 8-19; Acacia Br. 2-6, 29-31.

[6] The contract interpretation principles invoked by respondents are inapplicable in this case; they assume that the contract language is ambiguous and ignore HUD's role in administering the counterpart statutory requirements. Alpine Br. 27-31; Acacia Br. 24, 30-31. For example, the principle that a contract should be construed "less favorably to that party which selected the contractual language" (Alpine Br. 28; Acacia Br. 24) applies only if the contract is "ambiguous" and each of the alternative readings is both "reasonable and practical." *United States* v. *Seckinger*, 397 U.S. 203, 211, 216 (1970). In this case, the contract is not ambiguous, and respondents' interpretation would produce unreasonable and impractical results that would defeat HUD's ability to avoid excessive increases. See Gov't Br. 21-22.

Those materials have no legal relevance[7] and, in any event, respondents' account of the program is factually flawed.[8]

Congress did not design the Section 8 program, as Alpine argues (Br. 9), solely to achieve a "simple" method of adjusting rents. Rather, Congress's intention was to establish rent-adjustment procedures that protect owners against increases in operating costs, but that prevent above-market rental increases that would encourage inefficient management.[9] In explaining the Section 8 pro-

[7] The contracts' integration clause (Gov't Br. 23 n.19) establishes that respondents' impressions about how HUD would administer the contracts are not legally relevant. Moreover, the language of the contracts, in light of the regulatory background, is sufficient to reveal the contracts' meaning. Isolated statements of HUD officials (see Alpine Br. 9, 16) cannot establish otherwise.

[8] Respondents contend that the affidavits they submitted in district court conclusively established the expectations of owners and the actions of HUD. Acacia Br. 2-4; Alpine Br. 3 n.8. We disagree. There was no need for the courts below to address those factual issues, as they decided the case solely based on *Rainier View*'s prior reading of the contracts. And the "anecdotal evidence" cited by respondents is not sufficient to support their sweeping claims about the background or operation of a nationwide program. Cf. *Department of Labor* v. *Triplett*, 494 U.S. 715, 723 (1990).

[9] "[A] housing owner whose operating cost increases are out of line with increases in comparable projects providing similar facilities and services in the area may not increase rents and would have to either absorb the operating cost increase or, preferably, take effective remedial action with respect to its management problems." H.R. Rep. No. 1114, 93d Cong., 2d Sess. 22 (1974); see Gov't Br. 20 n.18. Alpine asserts (Br. 9) that the Section 8 program was designed to rectify the problems of the prior Section 236 program and that any project-by-project adjustment would be inconsistent with that goal. The problem, however, that Congress identified in rent adjustments in the Section 236 program was that "the amount of the subsidy is fixed for forty years." H.R. Rep. No. 1114, *supra*, at 21. The response was the process created by Section 8(c)(2) of the Housing Act: a provision for general and specialized rent increases (to reflect increased operating costs), coupled with a com-

gram to owners (see Gov't Br. 23-24); in promulgating regulations (see 24 C.F.R. 880.609(c)); and in implementing the program,[10] HUD has consistently adhered to those twin goals.

In the early years of the program, HUD did not apply separate comparability caps, but the agency acknowledged its authority to do so. The first year that Adjustment Factors were published was 1976. J.A. 49; 41 Fed. Reg. 49,440 (1976). In 1978, a HUD Task Force Report (cited at Alpine Br. 29 n.84) described HUD's current policy as including both factor-based adjustments and comparability checks:

> The current statutory and regulatory rent adjustment policies allow some flexibility in determining the specific adjustment. The regulations repeat the statutory provision that Section 8 rents charged shall not be materially different for assisted and comparable unassisted units. *This policy permits Field Offices to adjust contract rents upward or downward based on a comparability analysis.*[11]

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parability restriction (to protect HUD against "higher costs resulting from inefficient management practices"). H.R. Rep. No. 1114, *supra*, at 22.

[10] Comparability determinations were made in establishing the initial rents, because HUD applied an alternative "rent reasonableness" test to initial rents based on comparability studies. See 24 C.F.R. 880.204(b)(1)(ii) (allowing owners to exceed comparable rents by no more than 20% and then only where the excess was cost justified); J.A. 48 n.1 (Declaration of James J. Tahash); Gov't Br. 25 n.22; Acacia Br. 2 n.2, 8-9, 25 n.17. Alpine's claim that initial rents were set solely by a negotiation process (Br. 9-11) ignores the applicable regulations. Because the manner of establishing initial rents entailed comparability studies, owners were on notice that implementation of the similarly worded "overall limitation" provision would entail comparability studies as well.

[11] HUD Task Force, *Section 8 Task Force Paper No. 2: Revisions to the Section 8 Rent Adjustment Policy* 2 (1978) (emphasis added). (We have lodged copies of the Task Force Report with

Respondents err in relying (Alpine Br. 18-19; Acacia Br. 5-6) on a HUD handbook. The 1978 HUD Handbook repeated the "overall limitation" requirement and required HUD field offices to "review the accuracy of the rent adjustment to ensure that it is comparable (neither too high or too low) in relation to similar assisted or unassisted units." HUD Handbook, § 7-8.a(1), (4) (May 1978) [7420.1.CHG], *reproduced at* Alpine C.A. Br. Addendum 8. Although the Handbook required revision of the Adjustment Factors in response to a comparability study, it did not suggest that HUD was precluded from applying another method to reflect the results of comparability studies. And by 1980, HUD officials had affirmed the agency's authority to use comparability studies as separate caps.[12]

The fact that HUD, briefly and at the beginning of the program, did not exercise its power to apply comparability caps does not divest it of the legal right to do so. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 647-648 (1950); *Beck Park Apartments* v. *HUD*, 695 F.2d 366, 371 (9th Cir. 1982). Nor does HUD's early practice suggest that owners expected complete immunity from comparability caps. The owners' expectations were best stated

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the Clerk of this Court.) The Task Force Report further noted that "[a]lso the regulations were revised last November 1977 to permit Field Offices to revise the AAAF based on documentation by the owner that rents for comparable units have increased at a faster rate than allowable under the published factors." *Ibid.* The regulation in question is 24 C.F.R. 888.204. The Ninth Circuit read that regulation as the exclusive means for addressing comparability, see *Rainier View*, 848 F.2d at 991, but the Task Force Report makes clear that it was an alternative method for applying comparability studies.

[12] *Section 8 Rent Adjustments, Elderly Housing, and Other Assisted Housing Issues: Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 98th Cong., 2d Sess. 65-68 (1984) [1984 House Hearings] (reproducing HUD memorandum, Aug. 28, 1980).

in the 1984 testimony of a leading industry representative:

> At the start of the program, * * * HUD made much of the "automatic annual adjustment" for rents, *with the only limitation being that Section 8 rents could not exceed comparable unassisted rents.* Developers thus knew that although the risk of loss was upon them, there was also the potential for profit, if they could obtain tenants and operate the project efficiently.[13]

4. Throughout their briefs, respondents claim that HUD administered comparability studies erratically, arbitrarily, and inaccurately. Acacia Br. 8-11, 26; Alpine Br. 20-21, 43. That is not the issue in this case. The agency's implementation of comparability studies does not resolve the question of whether the contract permitted an independent comparability cap. And, although HUD's conduct of comparability studies in the 1980s lacked national standards and produced some inconsistencies and erroneous results, we disagree with the broad claim that all of the comparability studies were necessarily inaccurate in measuring rents.[14]

Comparability studies of rents, properly administered, are similar to the standard appraisal technique used to value other types of property: [15] the studies examine rents

[13] 1984 House Hearings, *supra*, at 27 (prepared testimony of Charles L. Edson, on behalf of National Leased Housing Association) (emphasis added); see also Gov't Br. 24.

[14] Acacia argues (Br. 7) that if HUD's comparability studies were actually producing market rents, "the owners of Section 8 projects would not now be in dire financial straits." See also Alpine Br. 6. The Section 8 program, however, always entailed the "risk of loss." See text accompanying note 13, *supra*. In times of recession, it is hardly surprising that a marketplace cap on rents has put financial pressure on Section 8 owners. The pressures that exist, however, are being felt in the unassisted market as well.

[15] "Perhaps the best evidence of market value is market *data*, often referred to as "*comparable sales*." 2 American Institute of Real Estate Appraisers, *Condemnation Appraisal Practice* 84 (1973).

at similar properties and adjust for differences at the Section 8 project.[16] Such ground-level comparisons are the natural way to determine whether the general and broad-based Adjustment Factors are achieving their aim.[17] And the Assistance Contracts expressly provide that if the Adjustment Factors have materially overshot the mark in a particular case, the comparability determination prevails, "[n]otwithstanding any other provisions of this Contract." § 1.9d. Respondents' claim that they were promised automatic rental adjustments, whether or not materially in excess of the comparability standard, is untenable. Respondents' remaining claims accordingly fail, for lack of that essential premise.

B. *Absence of Substantial Impairment.* Even on respondents' view of the contracts, Section 801 is not a sub-

[16] This is a well-accepted method. "The rents of comparable properties can provide a basis for estimating market rent for a subject property once they have been reduced to a unit basis equivalent to the unit applied to the subject property. * * * If an appraiser uses proper judgment in making adjustments, a reasonably clear pattern of market rents should emerge." Appraisal Institute, *The Appraisal of Real Estate* 436-437 (10th ed. 1992).

[17] Respondents never explain how else HUD could determine whether rent adjustments would "result in material differences between the rents charged for assisted and comparable unassisted units." § 1.9d. That contract provision necessarily "envisions HUD making some type of market study of comparable rents * * * [and] [t]he most direct and accurate way for HUD to determine 'rents charged . . . for comparable units' would be to conduct some form of a survey of market rents charged for comparable units." *National Leased Housing Ass'n* v. *United States*, 22 Cl. Ct. 649, 659 (1991), appeal pending, No. 92-5064 (Fed. Cir.); *Carmichaels Arbors Assocs.* v. *United States*, 789 F. Supp. 683, 689 (W.D. Pa. 1992) ("the court itself cannot imagine[] how HUD could know whether there is any material difference in rents * * * unless someone undertakes to determine what the rents are at the comparable unassisted units"), appeal stayed pending resolution of this case, No. 92-3326 (3d Cir.).

stantial impairment of their rights. Gov't Br. 29-35. Acacia concedes (Br. 12) the essential point: "Under the Ninth Circuit's analysis, HUD could rely on 'comparability studies' as a way of satisfying itself that the AAAF adjustments fall into the proper range * * *." If that is true, then Section 801 preserves, not impairs, the core economic expectation of the owners: that owners would receive rent adjustments that fall within the range of comparable project rents. See *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) (a law that "restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment").[18]

Respondents argue that, because the government would be liable to make a significant payment to owners if Section 801 is struck down, the law necessarily works a substantial impairment. Acacia Br. 26-37; Alpine Br. 41-46. The proper test for determining whether the law works a substantial impairment of their *contract* rights, however, requires a comparison of the owners' position under Section 801 to the owners' reasonable expectations if HUD had implemented their contracts in accordance with the *Rainier View* reading. See *El Paso* v. *Simmons*, 379 U.S. 497, 515 (1965) (no substantial impairment of contracts despite significant economic savings to the State). *Rainier View* did not hold that the owners have an unqualified right to Adjustment Factor increases, regardless of whether those increases materially departed from market rents.

[18] Respondents argue that this Court may not consider the issue of substantial impairment because HUD did not specifically raise it in the courts below. Alpine Br. 2, 25. HUD, however, defended the constitutionality of Section 801, and "[o]nce a federal claim is properly presented, a party can make any argument [in this Court] in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1532 (1992). Moreover, where a private party is asking this Court to invalidate an Act of Congress on constitutional grounds, it is particularly important for this Court to address and resolve the relevant legal issues.

Under *Rainier View*, if HUD determined that "application of the formula would result in a disparity between section 8 and other rents," it must revise the formula "to keep assisted rents in line with market rents." 848 F.2d at 991. In the years in question, HUD did not revise the formula, because it believed that it could (more efficiently) achieve the same financial result by applying a comparability cap to specific projects. In consequence, however, the full-factor adjustments that respondents seek were never properly calibrated to their submarkets, although HUD found that their application would result in excessive rents. Section 801 remedies the agency's failure.[19]

1. *Retroactive provisions.* Respondents argue that nothing less than application of the full HUD Adjustment Factors to past years would satisfy their reasonable contract-based expectations. Accordingly, they assert that Section 801 is a substantial impairment because it requires use of a different factor.[20] Alpine Br. 42-44. That claim, however, assumes that owners had a reasonable expectation of receiving the particular Adjustment Factors that HUD published, and that their contracts prohibited congressional alteration of HUD's formulas. Neither claim is correct.

First, the contract did not guarantee any set level or specific amount of rent adjustments; the only substantive

[19] Alpine argues (Br. 42-44) that HUD could not have used comparability studies even to modify the factors. In so arguing, Alpine goes further than the Ninth Circuit, which stated that HUD was permitted to modify the formula "whenever application of the formula would result in a disparity between section 8 and other rents." *Rainier View*, 848 F.2d at 991.

[20] Section 801(a) requires factor-based adjustments that (a) apply to the contract rent, net of the cost of debt service, and (b) guarantee the owners a minimum of 30% of the HUD full-factor adjustment. Gov't Br. 9.

standard is that adjustments shall not result in material differences from the unassisted market. As we have noted, because HUD did not anticipate the *Rainier View* reading of the contracts, it did not modify the published Adjustment Factors to reflect comparability limitations for all owners. And, with respect to the class of owners covered by Section 801, Congress had reason to believe that the Adjustment Factors were not working properly.[21]

Second, Congress has always had the power to supersede HUD's definition of the Adjustment Factors in order to achieve the statutory goals. Neither the contract nor the statute specifies the components of "Automatic Annual Adjustment Factors" or the methods for applying them to contract rents. What Congress did in Section 801 was simply to make a determination of what constituted a "reasonable formula" for a particular class of owners. 42 U.S.C. 1437f(c)(2)(C). Its decision to do so did not violate any legitimate contract-based expectations.[22]

2. *Prospective provisions.* Respondents argue that Section 801's procedural modifications for the future impair

[21] The Section 801(a) formula applies to the class of owners whose adjustments were directly or indirectly limited by comparability studies. HUD, in turn, conducted comparability studies when it had reason to believe that the rent adjustments under the Adjustment Factors might be excessive. Gov't Br. 6, 18, 29-31; J.A. 47. Whether the comparability studies were accurate in every case is not at issue (see Acacia Br. 36), because the retroactive provisions do not set rents based on the comparability studies.

[22] The Section 801(a) formula provides annual rent *increases* on the portion of the contract rent used to cover general operating costs. That is a reasonable approach, particularly because it would have been impracticable to have applied the *Rainier View* approach to individual owners with respect to past years dating back to 1981; a general rule to cover the class of owners was necessary. Gov't Br. 29-31. "The fact that men will differ in opinion as to the adequacy of any particular yardstick of value emphasizes that the appropriateness of any one formula is peculiarly a matter for legislative determination." *Gelfert* v. *National City Bank*, 313 U.S. 221, 234 (1941).

substantial rights. Acacia Br. 12-13; Alpine Br. 44-46. We disagree.

Alpine asserts (Br. 46) that any possible future use of comparability studies would cause financial harm to owners, because the studies seek to erase the "initial difference" and necessarily defeat the objective of the Adjustment Factors: to compensate for the movement in market rents. That argument fails for two reasons. First, HUD has always protected the initial difference when it applied comparability caps, because the initial difference is considered in determining whether rents are *materially* different. See note 1, *supra*. Second, the Adjustment Factors themselves would be inaccurate if they produced rents materially in excess of local market rents. Section 801(c) recognizes that, where efforts to modify the factors cannot practicably achieve the statutory mandate of comparability, another method of adjustment is warranted.

Acacia asserts (Br. 12-13) that any future use of comparability studies would be substantially less accurate than the Adjustment Factors, which are published and must meet standards of statistical reliability. The Adjustment Factors, however, rely exclusively on broad "market surveys" of housing costs, J.A. 50-51 (declaration of David E. Shenk, Director of HUD Division of Economic Market Analysis), and cannot guarantee local accuracy in all cases (Gov't Br. 17)—which is precisely why HUD allows owners to seek an increased localized factor based on rent levels at "comparable [unassisted] units." 24 C.F.R. 888.204. Properly conducted comparability studies are likely to be more accurate on a local level than the general Adjustment Factors. And there is no reason to doubt that future comparability studies, carried out under HUD regulations, will produce reliable results.[23] The use of the comparability process, in short,

[23] In response to complaints about past comparability studies, HUD's proposed rule mandates standards for selecting comparable

does not significantly disadvantage owners; it simply implements the contract's standard of materially comparable rents.

C. *Due Process Review of Section 801.* Respondents argue that because Section 801 affects the government's financial obligations, it violates the Due Process Clause. There is, however, no rule of law that renders contracts with the government, alone of all forms of property interests, totally immune from legislative change. *See United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 25 (1977) ("The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations."). It is particularly inappropriate to foreclose, under the Due Process Clause, the regulation of rents at federally subsidized low-income housing projects. Even if we assume, therefore, that Section 801 works a sufficiently substantial impairment of contracts to warrant further due process inquiry, respondents have not demonstrated that Congress's action is unconstitutional.

1. Respondents contend that Congress enacted Section 801 simply to save money and that it is therefore invalid under *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330 (1935). Acacia Br. 40-46; Alpine Br. 47-50. Respondents' analysis of Congress's purposes is incorrect.

Legislators, of course, did state that one purpose of Section 801 was to avoid windfalls resulting from *Rainier View*.[24] But that was not its only purpose. The provi-

unassisted properties; states that "[c]omparability studies will be conducted by appraisers under industry-approved appraisal standards"; and provides for administrative appeals. 57 Fed. Reg. 49,126 (1992) (proposed rule 24 C.F.R. 888.503(c)). A comparability study must also satisfy requirements of administrative reasonableness and "is reviewable under administrative law principles." *Sheridan Square Partnership* v. *United States*, 761 F. Supp. 738, 745 n.3 (D. Colo. 1991).

[24] As this Court has recognized, however, the avoidance of windfalls is not equivalent to the illegitimate repudiation of a debt, which the Court addressed in *Lynch*. "One legitimate state interest is the elimination of unforeseen windfall profits." *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983).

sion establishes uniform criteria for HUD to administer, and implements Congress's original purpose that Section 8 rents shall not be materially different from open market rents. As a co-sponsor of Section 801 stated, Section 801 "is designed to promote nationwide uniformity in the manner in which HUD implements the comparability limitation * * * in making rent adjustments using the annual adjustment factors for section 8 projects." 135 Cong. Rec. S16,602 (daily ed. Nov. 21, 1989) (Sen. D'Amato); *id.* at S16,608. In recognition that "a market reality test must be an integral component of the Section 8 program to ensure that HUD pays reasonable rents," *id.* at S16,600 (section-by-section analysis), Congress directed HUD to promulgate regulations providing alternative means to determine whether the factors were achieving comparable rents.

Respondents argue that Congress could not reform the Section 8 program in that manner (Acacia Br. 45-46, 49), but was required to acquiesce in the *Rainier View* decision. Congress, however, was not obligated to elevate what it perceived to be one court's incorrect holding (and bad public policy) into the law of the land, simply because that would achieve uniform national administration of its low-income housing program. It was entirely reasonable for Congress to respond as it did—by restoring the market-oriented premise of the program (see note 9, *supra*) and by correcting what was perceived as "maladministration" by HUD officials. 135 Cong. Rec. S16,594 (daily ed. Nov. 21, 1989) (Sen. Cranston).

2. Acacia argues (Br. 46-48) that, even if Congress's purpose was to restore uniformity and appropriate procedures in the Section 8 program, that purpose cannot sustain Section 801 under the Due Process Clause. Accord-

ing to Acacia (Br. 47), some form of "stricter scrutiny under the due process clause" applies to contracts to which the federal government is a party, and Section 801 fails such scrutiny.

In our view, when federal legislation has the effect of modifying rights under a private party's contract with the government, the heightened form of review that applies to state legislation that impairs state financial contracts does not apply. Gov't Br. 36 & n.35. Even if that Contract Clause standard[25] were applicable here, however, Section 801 satisfies it. Section 801 reasonably accords with the expectations of Section 8 project owners that rents would not materially exceed rents at comparable unassisted projects. Moreover, Congress's retrospective revision of the adjustment formula and its limited provision for future alternative methods (including comparability studies) were necessary means to that end.

Alpine does not address the issue of what standards govern the due process inquiry. Instead, Alpine relies on the claim that it has "vested" contract rights and that those rights are immutable.[26] Alpine Br. 37-41, 47-50. But elsewhere Alpine concedes that Congress can (and has) made statutory changes that "impair the owner's contracts" and agrees that those changes are "binding on owners under existing HAP contracts." Alpine Br. 39 n.115 (noting changes in tenant's rental share and tenant

[25] A law that impairs the State's financial contracts must be both "reasonable and necessary to serve an important purpose" to survive Contract Clause scrutiny. *United States Trust Co.* v. *New Jersey*, 431 U.S. at 25 n.25.

[26] The notion of "vested rights" does not resolve the constitutional inquiry. As this Court has observed, "[w]e understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase is not one found in the language of the Constitution." *Campbell* v. *Holt*, 115 U.S. 620, 628 (1885).

eligibility requirements). Alpine provides no persuasive reason why those changes, which have a financial impact, are permissible, while the present changes, which further important public purposes in the expenditure of federal funds on subsidized housing, are not.

This Court's decision in *Bowen* v. *Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41 (1986), is instructive, notwithstanding that respondents have developed and operated Section 8 projects under contract with the government. Alpine Br. 39-41; Acacia Br. 33-34. While respondents have given consideration, respondents also benefit considerably from participating in the program: respondents receive the infusion of federal funds, and the terms of the contracts insulate the owners from many market risks. Gov't Br. 29 n.26. And, as in *POSSE*, the contracts at issue track statutory requirements; the non-federal parties had no bargaining power over the relevant terms; and the impairing legislation affects a "comprehensive social welfare program." 477 U.S. at 53; see Gov't Br. 32-33. In light of the public interests at stake in the provision of subsidized low-income housing, Congress retained authority to amend Section 8 to ensure that public expenditures served the program's objectives. Section 801's provision of a revised rent-adjustment procedure for achieving the program's pre-existing goals is a legitimate exercise of that power.[27] Cf. *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 252-253 (1987). Accordingly, Section 801 does not violate the owners' due process rights.

* * * * *

[27] Congress did not repudiate its core obligation to pay rent subsidies, to adjust them for inflation, or to compensate owners for reasonable increases in operating expenses. Thus, Congress did not undermine its pledge of the government's credit. Acacia Br. 32-33; Alpine Br. 37. Nor, for the same reasons, is this case analogous to respondents' hypothetical in which Congress eliminates all interest on Treasury notes. Alpine Br. 49 n.155.

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

LAWRENCE G. WALLACE
Acting Solicitor General

JOHN W. HEROLD
Associate General Counsel
Department of Housing
and Urban Development

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